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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1010

DALE H. DREWS, ET AL.,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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The Appellee, pursuant to the Rules of the Supreme Court of the United States, moves to dismiss or affirm on the following grounds:

(a) This appeal is not within the jurisdiction of this Court because it has not been taken in conformity with statute.

(b) This appeal does not present any substantial Federal question as to warrant further argument.

STATEMENT OF FACTS

The four Appellants were convicted by the Circuit Court of Baltimore County, Maryland, sitting without a jury, of violating Article 27, Section 123, of the Annotated Code of Maryland (1957 Ed.), "by acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement". Two of the Appellants are white men, one is a white woman and the last is a Negress.

The Appellants, accompanied by a Negro who was not tried, on Sunday, September 6, 1959, went to Gwynn Oak Park, a public amusement park in Baltimore County, owned and operated by a private corporation. The management of the park as a business policy did not at that time admit Negroes and the Appellants were requested to leave the premises. The Appellants refused and, as a result, a crowd began to gather. The Park's privately employed Park Guard enlisted the assistance of Baltimore County policemen who were stationed nearby to eject the group from the park. Baltimore County policemen arrived and requested that the Appellants leave the park. Upon receiving instructions from the park management, the Baltimore County policemen advised the Appellants that they had a choice of withdrawing or being arrested. They refused to leave, at which time they interlocked their arms and two of them dropped on the ground in a prone position. As a result of this conduct, the crowd which had gathered became unruly and began hollering, spitting and kicking at the Appellants as well as the officers, creating a mob scene. The Appellants were thereupon taken by the County Police from the scene and transported to a nearby police station where a warrant was sworn out by the amusement park management.

Thereafter, the State filed a criminal information charging violation of Article 27, Section 123, of the Annotated Code of Maryland, *supra*, and the Appellants elected to be tried by the Court sitting without a jury. The trial court, by its opinion dated May 6, 1960 (Appendix C of the Jurisdictional Statement), found that from the facts and circumstances there was clear and convincing proof that public disorder reasonably could be expected if Appellants were allowed to remain in the park, and that the continued refusal of the Appellants to leave at the request of the police constituted "acting in a disorderly manner to the disturbance of the public peace." From the opinion of the trial court, it does not appear that the Appellants raised any constitutional issues in that court.

On appeal to the Court of Appeals of Maryland, that Court, notwithstanding the fact that the Appellants did not raise constitutional questions in the lower court, found by its opinion (Appendix B of the Jurisdictional Statement) that the amusement park had a legal right to maintain a business policy of excluding Negroes, a private policy which the State neither legislated or assisted. The Court further found that the arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but, rather, because the Appellants were inciting a crowd by refusing to obey a valid directive to move from a place where they had no lawful right to be. The Court of Appeals of Maryland concluded that the action of the State in arresting and convicting the Appellants on warrants sworn out by the amusement park for disorderly conduct did not constitute "such action as may fairly be said to be that of the State's."

Appellants then proceeded to the Supreme Court of the United States, and on June 22, 1964, this Court vacated

the judgment and remanded the case to the Court of Appeals of Maryland for consideration in light of *Griffin v. Maryland*, 378 U.S. 130 and *Bell v. Maryland*, 378 U.S. 226. The Court of Appeals of Maryland re-examined the case according to this directive and on October 22, 1964, reinstated and reaffirmed the prior judgment of conviction (Appendix A, Jurisdictional Statement). The Court of Appeals of Maryland found that the facts of this case were significantly distinguishable from those of *Griffin* to produce an opposite result, and further, that there was no supervening public accommodations law enacted that would affect their decision, as in *Bell*.

ARGUMENT

I.

This Case Is Not Within the Appellate Jurisdiction of This Court.

The Appellants did not claim at any stage of the proceedings that the provisions of Article 27, Section 123, Annotated Code of Maryland, *supra*, were void, but, rather, now contend that the application of the statute was discriminatory and, therefore, in violation of the Fourteenth Amendment. Since no claim is made that the statute involved was invalid, an appeal will not lie. See *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185; *Jett Bros. Distilling Co. v. Carrolton*, 252 U.S. 1; *Mergenthaler Linotype v. Davis*, 251 U.S. 256, 259.

II.

This Appeal Does Not Present Any Substantial Federal Question.

The Appellants assert that the State of Maryland, as a result of the decisions below, has applied its criminal

law of disorderly conduct in such a way as to aid and encourage the segregation of an amusement park facility and the denial of the use thereof to Negroes solely on the basis of race. Nothing can be further from the truth. The position of the State of Maryland in this case is very clear. The State of Maryland neither required nor assisted by legislation or otherwise the decision of the amusement park, as a matter of business policy, to exclude Negroes. The State of Maryland has neither condemned nor condoned such business decision and policy. The arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but rather because the Appellants were inciting the crowd and, therefore, were acting in a disorderly manner. Both whites and Negroes in this instance acted in a disorderly manner, and the State without discrimination arrested and prosecuted all those who were so acting. As was stated by this Court in *Shelley v. Kraemer*, 334 U.S. 1, 13:

> "The action inhibited by the first Section of the Fourteenth Amendment is only such action as may be fairly said to be that of the State's. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*" (Emphasis supplied.)

The State of Maryland has not only the right but the duty to protect the public against disorders which may occur, regardless of the race of the participants. It was clearly recognized in the case of *Bernstein v. Real Estate Commission of Maryland*, 221 Md. 221, appeal dismissed 363 U.S. 419, that the general State laws apply to all with equal force, regardless of their race, and that violation of the general public laws cannot be shielded from State action on account of race. The Appellants are not entitled to an unexpressed exemption in the disorderly conduct law.

The establishment involved in this case was not publicly owned or operated, nor was it operated or franchised by the State, and the State had no law requiring segregation on these premises. Since the Appellants disobeyed the officers' directive and in so doing created a public disturbance, the State of Maryland had every right to arrest and prosecute the Appellants for this disturbance.

Appellants further contend that they were denied the rights of freedom of speech and freedom of assembly in contravention of the Fourteenth Amendment. To sustain this argument, one must assume that the owners of the amusement park were willing to allow the appearance of Appellants on their private premises. This was not the case, and as Justice Black has said:

> ". . . none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property." Dissent, *Bell v. Maryland*, 378 U.S. 226, ..., (1964).

Cf. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949).

Appellants also claim a denial of equal protection and due process of law because of the failure of the State of Maryland to arrest or prosecute unruly members of the crowd that gathered around them in Gwynn Oak Park, and the failure to prosecute other cases arising out of demonstrations at the same place of amusement. This contention is "without merit and has no bearing on the convictions in this case." *Drews v. Maryland*, 236 Md. 349, 204 A. 2d 64 (1964).

The guilt or innocence of Appellants is a question of fact that is determined by the circumstances of their own

case. It in no way depends on the prosecution or non-prosecution of other possible offenders. *Callan v. State*, 156 Md. 459, 466, 144 A. 350 (1929). Additionally, the non-discriminatory exercise of some selectivity in the enforcement of a criminal statute does not violate constitutional guarantees. *Oyler v. Boles*, 368 U.S. 448 (1962). See also *Moss v. Horning*, 314 F. 2d 89 (C.A. 2d 1963).

Finally, Appellants contend the passage of the Federal Civil Rights Act of 1964, 78 Stat. 241, requires the abatement of their pending convictions and the dismissal of their prosecutions. It is by no means clear that this is so, since it is highly questionable that Gwynn Oak Park, as an amusement park facility, is a covered establishment under the Federal law.

Conceding the existence of a cafeteria on the park's grounds, the Appellants have not shown that a substantial portion of the food which is served thereby had moved in commerce, as required by Sec. 201(c)(2). Such a demonstration of fact is necessary to bring the amusement park within the ambit of this statute under Sec. 201(b)(4) and (c)(4), as a facility within which exists a covered establishment and which holds itself out as serving the patrons of such covered establishment.

Nor have Appellants shown that the amusement park customarily presents any source of entertainment which has moved in commerce, which must be demonstrated to classify such a place of exhibition or entertainment as a covered establishment under Sec. 201 (b)(3) and (c)(3).

No discrimination or segregation by the cafeteria within the amusement park, or by the amusement park itself, was in any way, or to any measure, carried on under color of a custom or usage required or enforced by officials of the State or political subdivision thereof. As dis-

cussed above, the police officers of Baltimore County, Maryland and the courts of the State of Maryland were simply enforcing the legal right and duty of the State to maintain public peace and quiet and prevent public disorder.

CONCLUSION

The State of Maryland respectfully submits that the Appeal from the Court of Appeals of Maryland be dismissed, or, in the alternative, the decision of the Court of Appeals be affirmed, the mandate to issue forthwith.

Respectfully submitted,

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